IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6847

RECEIVED
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SUPREME COURT, U.S.

DARYL GEORGE HARSHFIELD, Appellant

v.

JAMES G. RICKETTS and J.D. MacFARLANE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

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June 1980

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. _____

DARYL GEORGE HARSHFIELD, Appellant
v.
JAMES G. RICKETTS and J.D. MacFARLANE

ON APPEAL FROM THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

JURISDICTIONAL STATEMENT

Daryl George Harshfield, the appellant, appeals from the final judgment of the United States Court of Appeals for the Tenth Circuit, dated and entered March 28, 1980, affirming the denial of his petition for a writ of habeas corpus in the United States District Court for Colorado. The petition alleged violations of Harshfield's due process and equal protection rights guaranteed by the Fourteenth Amendment of the Constitution of the United States.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth District, which appears in the appendix hereto, p. 1a, infra, is not reported. The opinion of the United States District Court for Colorado, which appears in the appendix hereto, p. 4a, infra, is also not reported.

The opinion of the Colorado Court of Appeals affirming appellant's sentencing, which appears in the appendix hereto, p. 6a, infra, is also not reported. The Colorado Supreme Court denied certiorari.

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JURISDICTION

The judgment of the United States Court of Appeals for the Tenth Circuit was entered on March 28, 1980. See p. 1a, infra.

A notice of appeal to this Court was duly filed in the said Court of Appeals on June 20, 1980. See p. 9a, infra.

This appeal is being docketed in this Court within 90 days from the judgment below. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(2).

QUESTIONS PRESENTED

Whether the denial of Harshfield's right to a hearing provided by the Colorado Sex Offenders Act violated his due process rights under the United States Constitution?

Whether the denial of Harshfield's right to a hearing provided by the Colorado Sex Offenders Act violated his equal protection rights under the United States Constitution?

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment, United States Constitution:

§1. . . . No state shall . . . deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

STATUTORY PROVISIONS

The applicable statutes under the Colorado Sexual Offenders Act, C.R.S. 1973 16-13-201 et seq are (with emphases added):

16-13-205. Commencement of Proceedings. Within twenty days after the conviction of a sex offense, upon the motion of the district attorney, the defendant, or the court, the court shall commence proceedings under this part 2 by ordering the district attorney to prepare a notice of the commencement of proceedings and to serve that notice upon the defendant personally.

16-13-206. Defendant to be advised of rights. (1) Upon the commencement of proceedings, the court shall advise the defendant, orally and in writing, that:

(a) The defendant is to be examined in accordance with the provisions of §16-13-207;

(b) The defendant has a right to counsel, and, if the defendant is indigent, counsel will be appointed to represent him;

(c) The defendant has a right to remain silent;

(d) An evidentiary hearing will be held pursuant to §16-13-210, and the defendant and his counsel will be furnished with copies of all reports prepared for the court pursuant to §§16-13-207 and 16-13-208 at least ten days prior to the evidentiary hearing.

(2) The written advisement of rights may be incorporated into the notice of commencement of proceedings.

16-13-207. Psychiatric examination and report. (1) (a) After advising defendant of his rights, the court shall forthwith commit the defendant to the Colorado state hospital, the university of Colorado psychiatric hospital, or the county jail.

(b) If committed to the Colorado state hospital or the university of Colorado psychiatric hospital, the defendant shall be examined by two psychiatrists of the receiving institution.

(c) If committed to the county jail, the defendant shall be examined by two psychiatrists appointed by the court.

(2) (a) The examining psychiatrists shall make independant written reports to the court which shall contain the opinion of the psychiatrists as to whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(b) The written reports shall also contain opinions concerning:

(I) Whether the defendant is mentally deficient.

(II) Whether the defendant could benefit from psychiatric treatment; and

(III) Whether the defendant could be adequately supervised on probation.

(3) The examinations shall be made and the reports filed with the court and the probation department within sixty days after the commencement of proceedings, and this time may not be enlarged by the court.

16-13-208. Report of probation department. (1) Upon the commencement of proceedings under this part 2, the court shall order an investigation and report to be made by the probation officer similar to the presentence report provided for in §16-11-102.

(2) The report shall be filed with the court within seventy-five days after the commencement of proceedings, and this time may not be enlarged by the court.

16-13-209. Termination of proceedings. After reviewing the reports of the pyschiatrists and the probation officer, the court may terminate proceedings under this part 2 and proceed with sentencing as otherwise provided by law.

16-13-210. Evidentiary hearing. (1) (a) The court shall set a hearing date at least ten days and no more than twenty days after service upon the defendant and his counsel of the reports required by §§16-13-207 and 16-13-208.

(b) The court may, in its discretion, upon the motion of the defendant, continue the hearing an additional twenty days.

(2) (a) The court shall, upon motion of the district attorney or the defendant, subpoena all witnesses required by the moving party in accordance with the Colorado rules of criminal procedure.

(b) The district attorney shall serve upon the defendant and his counsel a list of witnesses to be called by the district attorney at least ten days before the evidentiary hearing.

(3) In the evidentiary hearing, the court shall receive evidence bearing on the issue of whether the defendant, if at large, constitutes a threat of bodily harm to members of the public.

(4) In the evidentiary hearing, the following procedures shall govern:

(a) The district attorney may call and examine witnesses, and the defendant shall be allowed to cross-examine those witnesses;

(b) The defendant may call and examine witnesses, and the district attorney shall be allowed to cross-examine those witnesses.

(c) The defendant may call and examine as adverse witnesses the psychiatrists and probation officers who have filed reports pursuant to §§16-13-207 and 16-13-208.

(5) The reports of the psychiatrists and probation officers filed with the court pursuant to §§16-13-207 and 16-13-208 may be received into evidence.

(6) Except as otherwise provided in this section, the laws of this state concerning evidence in criminal trials shall govern in the evidentiary hearing.

16-13-211. Findings of fact and conclusions of law. (1) After the evidentiary hearing, the court shall, within five days, make oral or written findings of fact and conclusions of law.

(2) If the court finds beyond a reasonable doubt that the defendant, if at large, constitutes a threat of bodily harm to members of the public, the court shall commit the defendant pursuant to §16-13-203.

(3) If the court does not find as provided in subsection (2) of this section, it shall terminate proceedings under this part 2, and proceed with sentencing as otherwise provided by law.

(4) If the findings and conclusions are oral, they shall be reduced to writing and filed within ten days, and the defendant shall not be committed to the custody of the department pursuant to §16-13-203 until the findings and conclusions are filed.

16-13-212. Appeal. The defendant may appeal an adverse finding made pursuant to §16-13-211 in the same manner as is provided by law for other criminal appeals.

STATEMENT OF THE CASE

Harshfield pleaded guilty to sexual charges and admitted prior felony convictions. He then exercised his right to initiate proceedings under the Sex Offenders Act. The Act sets forth other explicit rights, including the unqualified right to a hearing. The Act also requires that the court make findings from the hearing and mandates either commitment under the Act, or sentencing as otherwise provided by law, based on the findings.

However, at the time set for the hearing, the trial court terminated the proceedings under the Act without a hearing, pursuant to another section of the Act. Had a hearing been held, the evidence would have resulted in findings mandating an indeterminate to life commitment as a sexual offender, rather than sentences. Harshfield received two concurrent life sentences under the Colorado habitual criminal statute.

The trial court denied Harshfield's motion for correction of illegal sentences; the state court of appeals affirmed the denial; and the state supreme court denied certiorari. The United States district court for Colorado denied the writ of habeas corpus, and the court below affirmed, holding (at p. 3a infra):

The language of the Act lends itself to several interpretations. Harshfield would have us substitute our interpretation of the Act for that of the Colorado Supreme Court. This we decline to do. In People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975), the court viewed the Act, in circumstances similar to those of the instant case, as merely providing a "sentencing alternative." 544 P.2d at 976. Therefore, even if the proceedings are terminated prior to the hearing stage--as permitted by the statute itself--no constitutional right is violated.

Specht v. Patterson, 386 U.S. 605 (1967), which struck down an earlier version of the Colorado Sex Offenders Act, is inapplicable here. In Specht, the petitioner had been sentenced under the Act without a proper hearing, even though the sentencing required new findings of fact. In contrast, Harshfield was sentenced under appropriate statutory authority following proper pleas of guilty.

THE QUESTIONS ARE SUBSTANTIAL

The Colorado Sex Offenders Act grants a defendant the right to initiate proceedings under the Act, mandating that the court shall then commence proceedings under the Act. See §16-13-205, supra at p. 2. In accord, People v. Harshfield, infra at p. 7a; People v. Medina, Colo., 564 P.2d 119 (1974).

The Act grants a defendant the full panoply of relevant protections of due process rights (see §16-13-206, supra, p. 2), including the explicit and unqualified right to a hearing. The genesis of the legislative grant of these rights was the invalidation of the earlier version of this Act in Specht v. Patterson, supra, as unconstitutional on due process grounds for lack of procedural safeguards.

It cannot be contraverted then that Harshfield had been granted under the Act:

the due process procedural rights set forth in §16-13-206;

the right to commence proceedings;

the right to a hearing;

the right to findings of fact and conclusions of law; and

the right to an indeterminate to life commitment, in lieu of the sentence otherwise provided by law, if the court found beyond a reasonable doubt that he, if at large, constituted a threat of bodily harm to members of the public.

In summary, Harshfield's convictions in this case were made the basis for commencing the separate criminal proceedings under the Act, to determine whether he constituted a threat of bodily harm to the public. Specht v. Patterson, supra. That is a new finding of fact that was not an ingredient of the offenses charged. Id. Harshfield had the right to a full judicial hearing to determine whether or not he was entitled to commitment under the Act and the opportunity for treatment, rehabilitation and release. Id. And there must be findings adequate to make meaningful the appeal provided by §16-13-212 of the Act. Id. As the Colorado supreme court said of the invalidated earlier sex offenders statute in Trueblood v. Tinsley, 148 Colo. 503, 366 P.2d 655 (1961), cert. denied, 370 U.S. 929 (1962):

> The trial court is empowered only to impose sentence under and in accordance with the statute. In so doing the court performs a ministerial function with discretion confined to the limits permitted by this section.

In denying Harshfield his right to a hearing, the opportunity for treatment, rehabilitation and release, rather than lifetime incarceration, was denied Harshfield. A person who is subjected to a grievous loss of liberty is entitled to adequate procedural safeguards. Wolff v. McDonnell, 418 U.S. 539 at 558, holding:

> We think a person's liberty is equally protected, even when the liberty itself is a statutory creation of the state. The touchstone of due process is protection of the individual against arbitrary action of the government, Dent v. West Virginia, 129 U.S. 114, 123 (1889). Since prisoners in Nebraska can only lose good-time credit if they are guilty of serious misconduct, the determination of whether such behavior has occurred becomes critical, and the minimum requirements of due process appropriate for the circumstances must be observed.

See also Specht v. Patterson, 386 U.S. at 610; In re Gault, 387 U.S. 1 at 21 (1966); Baxstrom v. Herold, 383 U.S. 107 at 110-111 (1966); Morrissey v. Brewer, 408 U.S. 471 at 489, 492 (1972). The opportunity to be heard is fundamental to due process of law. Grannis v. Ordean, 234 U.S. 385 at 349 (1914).

The summarial termination of proceedings under the Act and the resultant denial of a hearing deprived Harshfield of the opportunity for treatment, rehabilitation and release, violating his due process rights under the Fourteenth Amendment. Commitment proceedings under the Act are subject to the due process clause of the Fourteenth Amendment. Specht v. Patterson, supra.

The foregoing refusal of a hearing and the concomitant refusal to classify Harshfield under the Sex Offenders Act is repugnant to the equal protection provision under the Fourteenth Amendment. Other defendants in similar factual circumstances who were not arbitrarily denied their rights under the Act would have the opportunity for treatment, rehabilitation and release denied Harshfield. Commitmant proceedings are subject to the equal protection clause of the Fourteenth Amendment. Id.

This is but one of many cases under the Act, past and future, in which defendants' due process and equal protection rights have been, or will be violated.

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

GENE BEVILLE
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June 1980

Counsel for Appellant

NOT FOR ROUTINE PUBLICATION

UNITED STATES COURT OF APPEAL

TENTH CIRCUIT

FILED
United States Court of Appeals
Tenth Circuit
MAR 28 1980
HOWARD K. PHILLIPS
Clerk

DARYL GEORGE HARSHFIELD, Petitioner-Appellant	)	
v.	)	No. 78-1939
JAMES G. RICKETTS, Executive Director, Colorado Department of Corrections, et al., Respondents-Appellees.	)	

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
(D.C. Civil Case No. 78-M-722)

Submitted on the briefs:

Gene Beville of O'Donnell, Beville & Ripple, P.C., Denver, Colorado, for Petitioner-Appellant.

John Daniel Dailey, Assistant Attorney General (J. D. McFarlane, Attorney General; Richard F. Hennessey, Deputy Attorney General; and Edward G. Donovan, Solicitor General, with him on the brief), Denver, Colorado, for Respondents-Appellees.

Before McKAY, LOGAN and SEYMOUR, Circuit Judges.

PER CURIAM

After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34(a); Tenth Circuit R. 10(e). This cause is therefore ordered submitted without oral argument.

Harshfield appeals from the dismissal of his 28 U.S.C. § 2254 petition for habeas corpus. On constitutional grounds he challenges a Colorado state court's failure to provide him with a hearing under the Colorado Sex Offenders Act (Act), Colo. Rev. Stat. §§ 16-13-201 et seq. (1973). We affirm.

Harshfield pleaded guilty to rape and deviate sexual intercourse and admitted four prior felony convictions. He then moved to initiate proceedings under the Sex Offenders Act. The trial court received reports from two psychiatrists, both of whom asserted that Harshfield, if at large, would constitute a threat of bodily harm to members of the public. Had the court adopted that finding as its own, it would have had authority to sentence under the Act's provisions. However, pursuant to a specific provision of the Act, the court terminated the proceedings without a hearing and sentenced Harshfield to two concurrent life sentences, not under the Sex Offenders Act, but under a habitual criminal statute. Harshfield argues that the Colorado statutory scheme by its own language requires a complete hearing under the provisions of the Sex Offenders Act.

The language of the Act lends itself to several interpretations. Harshfield would have us substitute our interpretation of the Act for that of the Colorado Supreme Court. This we decline to do. In People v. Breazeale, 190 Colo. 17, 544 P.2d 970 (1975), the court viewed the Act, in circumstances similar to those of the instant case, as merely providing a "sentencing alternative." 544 P.2d at 976. Therefore, even if the proceedings are terminated prior to the hearing stage--as permitted by the statute itself--no constitutional right is violated.

Specht v. Patterson, 386 U.S. 605 (1967), which struck down an earlier version of the Colorado Sex Offenders Act, is inapplicable here. In Specht, the petitioner had been sentenced under the Act without a proper hearing, even though the sentencing required new findings of fact. In contrast, Harshfield was sentenced under appropriate statutory authority following proper pleas of guilty.

AFFIRMED.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLORADO

Civil Action No. 78 M 722

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO
OCT 11 1978
JAMES R. MANSPEAKER
CLERK

DARYL GEORGE HARSHFIELD.

Petitioner,

v.

DR. ALLEN AULT, Executive Director, Colorado Department of Corrections,

Respondent.

MEMORANDUM AND ORDER

This is a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254 by an inmate of the Colorado State Penitentiary serving two concurrent terms of natural life as a result of a judgment of conviction entered by the District Court in and for the County of Jefferson, State of Colorado, pursuant to pleas of guilty to rape and deviate sexual intercourse with an admission of four prior felony convictions. After pleading, the petitioner moved to initiate proceedings under the Colorado Sex Offenders Act, §§ 16-13-201 et seq., C.R.S. 1973. Following examination and reports by court-appointed psychiatrists, the trial court terminated the proceedings in the manner expressly authorized by § 16-13-209 and proceeded with sentencing as otherwise provided by law. The sole question presented in this proceeding is whether such a termination, without hearing, violates the due process and equal protection provisions of the Fifth, Sixth and Fourteenth Amendments of the Constitution of the United States. There is no dispute about the facts and the question has been fully briefed. Accordingly, no hearing is necessary.

The petitioner relies upon Specht v. Patterson, 386 U.S. 605 (1967) for the contention that there can be no termination without an evidentiary hearing. That case held that a commitment for an indefinite term without an evidentiary hearing pursuant to the previous Colorado statute on sex offenses was a denial of due process. Clearly the protection of the defendant's liberty required such a hearing.

The petitioner here has been deprived of his liberty through due process of law because he was sentenced under appropriate statutory authority upon proper pleas of guilty. That provision of the Colorado Sex Offenders Act which entitles him to initiate proceedings for such alternative sentencing does not create any interest subject to the protection of the United States Constitution. I am in full agreement with the disposition of that issue by the Supreme Court of Colorado in People v. Breazeale, 544 P.2d 970 (Colo. 1975).

Upon the foregoing, it is

ORDERED that the petition for a writ of habeas corpus is denied and this civil action is dismissed.

Dated: October 11, 1978.

BY THE COURT:

s/ Richard P. Matsch

Richard P. Matsch, Judge
United States District Court

COLORADO COURT OF APPEALS

NO. 76-624

THE PEOPLE OF THE STATE OF COLORADO,	)
Plaintiff-Appellee,	)
v.	)
DARYL GEORGE HARSHFIELD,	)
Defendant-Appellant.	)

Appeal from the District Court of
Jefferson County

Honorable Daniel J. Shannon, Judge

Division I
Memorandum Opinion by JUDGE COYTE JUDGMENT AFFIRMED
Berman and Kelly, JJ., concur.

J. D. MacFarlane, Attorney General
Jean E. Dubofsky, Deputy Attorney General
Edward G. Donovan, Assistant Attorney General
Deborah L. anco, Assistant Attorney General
Felipe V. F ce, Assistant Attorney General
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Rollie R. Rogers, Colorado State Public Defender
James F. Dumas, Jr., Chief Deputy State Public Defender
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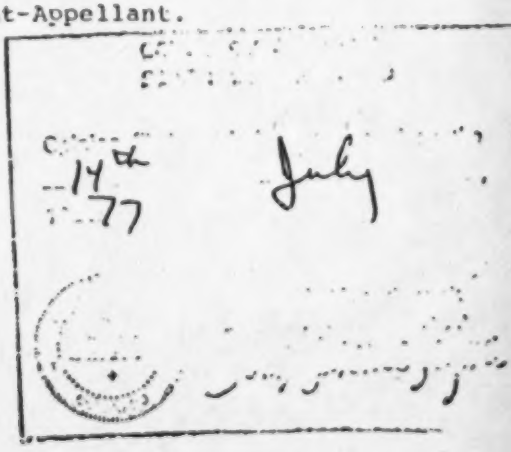
Attorneys for Defendant-Appellant.



This appeal presents the single question of whether one convicted of a sex offense and thereafter considered by the trial court for sentencing under the Colorado Sex Offenders Act, §§16-13-201 et seq., C.R.S. 1973, is entitled to a hearing prior to the trial court's termination of those proceedings. Concluding that neither the applicable statutory provisions nor pertinent judicial authority so requires, we affirm the judgment.

Following advisement of his rights and his plea of guilty to counts of rape and deviate sexual intercourse, the defendant, Daryl Harshfield, was permitted to initiate proceedings under the Sex Offenders Act. The court subsequently appointed two psychiatrists to examine defendant. Based on their opinions and other reports contained in the record, the court determined that sentencing under the Sex Offenders' Act was not appropriate. It thereupon terminated the proceedings and sentenced defendant as otherwise provided by statute.

Defendant maintains that, absent the evidentiary hearing prescribed by §16-13-210, C.R.S. 1973, the trial court had no authority to terminate the special proceeding. We perceive no error.

A defendant has no constitutional or statutory right to be sentenced under the Sex Offenders' Act, People v. Medina, ___ Colo. ___, 564 P.2d 119 (1977), even when he is deemed to constitute a threat of bodily harm to members of the public. See People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974). While the court must open proceedings upon timely request, §16-13-205, C.R.S. 1973, it may also terminate them after review of the necessary reports. Section 16-13-209, C.R.S. 1973. And where sentence is imposed pursuant to other statutory provisions rather than under the Act, due process does not demand that the defendant

be afforded an evidentiary hearing. Compare Specht v. Patterson, 386 U.S. 605, 87 S.Ct. 1209, 18 L.Ed.2d 326 (1967) with People v. Breazeale, ___ Colo. ___, 544 P.2d 970 (1976).

In this case, defendant possessed no right which would necessitate a hearing prior to sentencing, cf. Specht v. Patterson, supra, and consequently there is no conflict between the respective provisions of the Act. Accordingly, the trial court did not err in terminating the proceedings and imposing its sentence.

The judgment is affirmed.

JUDGE BERMAN and JUDGE KELLY concur.

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Tenth Circuit
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HOWARD K. PHILLIPS
Clerk

United States Court of Appeals
For the Tenth Circuit

DARYL GEORGE HARSHFIELD, Petitioner-Appellant, v. JAMES G. RICKETTS and J.D. MacFARLANE, Respondents-Appellees,	)	Civil Action No. 78-1939

NOTICE OF APPEAL TO THE SUPREME COURT
OF THE UNITED STATES

Notice is hereby given that Daryl George Harshfield, the Petitioner- Appellant above named, hereby appeals to the Supreme Court of the United States from the final order affirming the denial of a writ of habeas corpus entered in this action on March 28, 1980.

This appeal is taken pursuant to 28 U.S.C. §1254(2).

Gene Beville
Counsel for Petitioner-Appellant
Twelve Twenty Monaco Parkway
Denver CO 80220
377 4161

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above was deposited in the U.S. Mails, postage prepaid, this 20th day of June, 1980, addressed to:

J.D. MacFarlane, Attorney General
1525 Sherman St.
Denver CO 80203

CERTIFICATE OF FILING

I hereby certify that the foregoing Notice of Appeal was filed with the clerk of the United States Court of Appeals for the Tenth Circuit on the 20th day of June, 1980.

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SUPREME COURT, U.S.

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1979

No. 79-6847

DARYL GEORGE HARSHFIELD, Appellant

v.

~~JAMES G. RICKETTS AND J.D. MacFARLANE
ALLEN AULT, EXECUTIVE DIRECTOR,
COLORADO DEPARTMENT OF CORRECTIONS, Appellee~~

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The appellant, Daryl George Harshfield, who is now held in the Colorado State Penitentiary, asks leave to file the attached Jurisdictional Statement on appeal from the United States Court of Appeals for the Tenth Circuit without prepayment of costs and to proceed in forma pauperis, pursuant to Rule 53 and U.S.C. §3006A(d)(6).

The United States Court of Appeals for the Tenth Circuit has appointed this counsel under the Criminal Justice Act to represent the Appellant.

Respectfully submitted

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Counsel for Appellant

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

ORIGINAL COPY

No. 79-6847

DARYL GEORGE HARSHFIELD,

Petitioner,

v.

JAMES G. RICKETTS, Executive Director,
Colorado Department of Corrections, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION Motion to Dismiss

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IN THE

SUPREME COURT OF THE

UNITED STATES

October Term, 1979

No. _____

DARYL GEORGE HARSHFIELD,

Petitioner,

v.

JAMES G. RICKETTS, Executive Director,
Colorado Department of Corrections, et al.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

INTRODUCTORY STATEMENT

Daryl Harshfield appeals pursuant to 28 U.S.C. 1254(2). From the Tenth Circuit Court of Appeals affirmance of the denial of his federal habeas corpus petition. Since the Tenth Circuit did not determine any Colorado statute to be "invalid as repugnant to the constitution, treaties, or laws of the United States," appellate jurisdiction under 28 U.S.C. 1254(2) is not proper. The respondent recognizes, however, that habeas corpus questions are reviewable by certiorari, Ex parte Quinn, 317 U.S. 1, 63 S. Ct. 1, 87 L. Ed. 3 (1942), and that this Court will treat matters improvidently raised on appeal as being raised by petition

for certiorari. 28 U.S.C. 2103. Since Mr. Harshfield's jurisdictional statement appears to have been filed with this Court within ninety days of the Tenth Circuit's March 28, 1980 decision, the respondent will treat it as a petition for certiorari and will reply accordingly. Mr. Harshfield will be referred hereafter as the petitioner.

The petitioner pled guilty to charges of rape and devious sexual intercourse by force. Ordinarily, the penalty for each of these crimes would range from five to forty years imprisonment. Colo. Rev. Stat. 1973, 18-1-104. However, since the petitioner admitted four prior felony convictions, he became punishable under the state habitual criminal statute by a term of life imprisonment for either the rape or the deviate sexual intercourse.

The petitioner moved for commencement of proceedings under the Colorado Sex Offenders Act, Colo. Rev. Stat. 1973, 16-13-201, et seq. Under the Act, the petitioner, if found to be a dangerous threat to society, potentially would be punishable by an indefinite term of imprisonment in the state penitentiary. Colo. Rev. Stat. 1973, 16-13-203. After reviewing the reports of two psychiatrists and the Probation Department, the trial court, pursuant to Colo. Rev. Stat. 1973, 16-13-209, terminated proceedings under the Act. The court subsequently sentenced petitioner as a habitual criminal to the state penitentiary for two concurrent terms of life imprisonment.

The petitioner applied to the federal district court for federal habeas corpus relief. Said application was denied, and the decision of the district court was affirmed by the Tenth Circuit Court of Appeals. Here, the petitioner

asserts that the Colorado Sex Offenders Act affords him an unqualified right to a hearing and that termination of sex offender proceedings without a hearing contravenes his rights to due process and equal protection of the law. Initially, the respondents note that the Colorado Supreme Court has construed the Sex Offender Act as not providing an individual with an unqualified right to a hearing thereunder. People vs. Breazeale, 190 Colo. 17, 544 P.2d 970 (1976). Since the highest state court's construction of a state law is binding upon this Court, Groppi vs. Wisconsin, 400 U.S. 505, 91 S.Ct. 490, 27 L.Ed.2d 571 (1971), this court must accept that the Colorado Sex Offenders Act does not afford an individual a hearing prior to a decision to terminate proceedings thereunder. People vs. Breazeale, supra.

QUESTIONS PRESENTED

1. Does the Colorado Sex Offenders Act create a liberty interest such that due process requires a hearing prior to a decision to terminate such proceedings?

2. Is equal protection violated by the termination of sex offender proceedings without a hearing?

CONSTITUTIONAL AND STATUTORY PROVISIONS

In addition to the constitutional and statutory provisions listed by the petitioner, the respondent would cite the following:

> Colo. Rev. Stat. 1973, 16-13-202(3):
> "Department" means the department of corrections.

Colo. Rev. Stat. 1973, 16-13-203. Indeterminate commitment. The district court having jurisdiction may, subject to the requirements of this part 2, in lieu of the sentence otherwise provided by law, commit a sex offender to the custody of the department for an indeterminate term having a minimum of one day and a maximum of his natural life.

Colo. Rev. Stat. 1973, 18-3-401(2). Rape is a class 3 felony....

Colo. Rev. Stat. 1973, 18-3-403(2). Deviate sexual intercourse by force is a class 3 felony.

Colo. Rev. Stat. 1973, 18-1-105. Felonies classified, penalties.... Class 3 felony: minimum sentence -- 5 years imprisonment; maximum sentence -- 40 years imprisonment.

ARGUMENT

I.

SINCE NO LIBERTY INTEREST IS CREATED UNDER THE COLORADO SEX OFFENDERS ACT, DUE PROCESS DOES NOT REQUIRE A HEARING BE HELD PRIOR TO A DECISION TO DISCONTINUE PROCEEDINGS THEREUNDER.

The petitioner contends that the termination of sex offender proceedings without a hearing contravenes due process of law. This argument is, of course, premised upon the belief that the Sex Offenders Act creates a statutory liberty interest to which he is entitled. See, Wolff v. McDonald, 418 U.S. 539, 94 S. Ct. 2963, 41 L. Ed. 2d 935 (1975).

The petitioner alleges that, under section 211 of the Act, he has a right to indeterminate commitment if the trial court finds beyond a reasonable doubt that, if at large, he would constitute a threat of bodily harm to members of the public (petition, p. 5). The Colorado Supreme Court, how-

ever, has held that the defendant never has a right to be sentenced as a sex offender, even if he were found to be a threat to society. People v. Lyons, 185 Colo. 112, 521 P.2d 1265 (1974). The structure and language of the Act supports the court's ruling. Section 211 does not require a trial court to sentence an individual to an indefinite term upon a finding of dangerous. Rather, section 211 requires only that he be sentenced pursuant to section 203. Section 203 provides:

> The district court having jurisdiction may, subject to the requirement of this part 2, in lieu of the sentence as provided by law, commit a sex offender to the custody of the department of indeterminate term having a minimum of one day and a maximum of his natural life.

(emphasis added).

As is readily apparent, section 211 does not mandate sentencing under the Sex Offenders Act, but ultimately relates back to the court's discretion to sentence the individual either under the Act or as otherwise provided by law. Sections 203 and 209 of the Act, when read together, make it abundantly clear that traditional sentencing concerns have not been supplanted or preempted by the enactment of the Sex Offenders Act. See, e.g., Ibibodeau v. Commonwealth of Massachusetts, 428 F. Supp. 542 (D. Mass. 1977). The respondents submit that the following passage from People v. Breazeale, supra, is dispositive of the petitioner's argument:

> We have here a situation in which there is no constitutional mandate requiring a sex offenders act. The provisions of this act vest a trial court with discretion to commit a defendant under an alternate sen-

> tence. This is similar to the discretion in a court to suspend a sentence or to grant probation.
>
> From the wording of the sex offenders act, it appears that a defendant may require the commencement of a hearing. However, the matter of whether there should be sentencing under the act is an alternative which may be granted or denied by the court, once the psychiatrists' and probation officers' reports have been filed and reviewed. This being a sentencing alternative, a constitutional right is not attained.

544 P.2d at 976. See also People v. Medina, 193 Colo. 190, 564 P.2d 119 (1977); People v. Sanchez, 184 Colo. 379, 520 P.2d 751 (1974). Cf. United States v. Batchelder, 442 U.S. 114, 125, 99 S. Ct. 2198, 60 L.Ed.2d 755 (1979) ("Just as a defendant has no constitutional right to elect which of two applicable federal statutes shall be the basis of his indictment and prosecution, neither is he entitled to choose the penalty scheme under which he will be sentenced.")

Moreover, absent his habitual criminal status, the petitioner could have received maximum sentences of up to forty years imprisonment on each count via normal sentencing procedures. Colo. Rev. Stat. 1973, 18-1-105. Under the Sex Offenders Act, however, he potentially could have been imprisoned for the remainder of his natural life. Colo. Rev. Stat. 1973, 16-13-203. In Specht v. Patterson, 386 U.S. 605, 87 S. Ct. 1209, 18 L. Ed. 2d 326 (1967), this Court observed that the Colorado Sex Offenders Act, similar to the current statute but without the current provisions relating to an evidentiary hearing prior to sentencing thereunder, was enacted for the purpose of keeping "individuals from inflicting future harm." 386 U.S. at 609. Because in Specht, the Act was held to be an enhanced penalty statute

based, in essence, upon a new charge, see, e.g., United States v. Bowdach, 561 F.2d 860, 872-873 (10th Cir. 1977); State v. Williams, 295 N.C. 655, 249 S.E.2d 709, 720 (1978); State v. Sanders, 35 Or. App. 503, 582 P.2d 22, 24 (1978), a hearing was required before one could be sentenced thereunder.

The sections of the Act which the petitioner relies upon for his statutory liberty interest theory (sections 206, 210, 211 and 212), as well as section 209, were enacted by the Colorado General Assembly in response to the Specht decision and were designed only to meet the requirements of Specht, rather than to change the nature and purpose of the Act. People v. Breazeale, supra.1/ It is difficult to perceive any liberty interest in a statute which enhances the potential penalty for rape and deviate sexual intercourse from forty years imprisonment to imprisonment for the remainder of one's natural life. In fact, it seems incongrous to suggest that a liberty interest requiring a hearing exists both in being sentenced and in avoiding being sentenced under this statute. Specht v. Patterson, supra; People v. Breazeale, supra. Logically, due process should not require a hearing prior to the termination of sex offender proceedings since such termination eliminates the possibility of imposing a penalty potentially greater than that normally associated with the crimes of which an individual stands convicted.

II.

TERMINATION OF SEX OFFENDER PROCEEDINGS WITHOUT A HEARING DOES NOT VIOLATE EQUAL PROTECTION SINCE NO PARTY IS ENTITLED TO BE SENTENCED THEREUNDER ANYWAY.

The petitioner asserts that termination of sex offender proceedings without a hearing deprives him of equal protection of the law. This, he argues, follows from the fact that another individual, in like circumstances, having had a hearing and been found to constitute as threat to society, would necessarily receive the treatment, rehabilitation, and release under the Act which was denied him. This premise is faulty since other individuals in like circumstances who have the benefit of a hearing and are found to constitute a threat to society are not entitled to be committed under the Sex Offenders Act. Commitment under the Sex Offenders Act is always optional with the trial court. People v. Breazeale, supra; People v. Lyons, supra. In Williams v. Illinois, 399 U.S. 235, 243, 90 S.Ct. 2018, 26 L.Ed.2d 586 (1970), this Court, in discussing the equal protection clause of the fourteenth amendment, noted:

> Sentencing judges are vested with wide discretion in the exceedingly difficult task of determining the appropriate punishment in the countless variety of situations that appear. The Constitution permits qualitative differences in meting out punishment and there is no requirement that two persons convicted of the same offense receive identical sentences. Thus, it was that in Williams v. New York, 337 U.S. 241, 247 (1949), we said: 'The belief no longer prevails that every offense in a like legal category calls for identical punishment without regard to the past life and habits of a particular offender.'

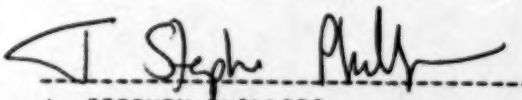
Accordingly, in the absence of a showing of arbitrary and invidious discrimination, the court's exercise of its discretionary power to sentence an individual as otherwise provided by law does not deny him the equal protection provisions of the fourteenth amendment. Andrus v. Turner, 421 F.2d 290 (10th Cir. 1970). Since the petitioner here neither avers nor establishes that the trial court acted discriminatorily in terminating the proceedings and in sentencing him as otherwise provided by law, he is not entitled to relief on equal protection grounds. Cf. Rhinehart v. Rhay, 440 F.2d 718 (9th Cir.), cert. denied 404 U.S. 825 (1971).

CONCLUSION

For the foregoing reasons, the respondent urges that certiorari be denied.

1/ The amendments neither provided for the treatment of an adjudicated sexual offender, as the petitioner apparently believes, nor altered the Act's effect as an enhanced punishment statute. Clearly, the amendments were intended not to assist an individual in receiving treatment of early release, but to prevent an arbitrary finding by a trial court which could possibly lead to life imprisonment.

FOR THE ATTORNEY GENERAL



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CERTIFICATE OF MAILING

I, J. Stephen Phillips, a member of the Bar of this Court, herewith certify that the within BRIEF IN OPPOSITION has been deposited in the United States mails, first-class postage prepaid, addressed to Michael Rodak, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C., 20593 and that to my knowledge the mailing took place on July 22, 1980, within the permitted time for filing the brief.

J Stephen Phillips

STATE Colorado)
) ss.
COUNTY OF Denver)

Subscribed and sworn to before me this 22d day of July, 1980.

Mary Ellen Keates
NOTARY PUBLIC

My Commission expires:
12/5/82

ALI/HARSHF/C2